No. 3921

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES B. A. FOSBURGH, as trustee of the estate of Continental Candy Corporation (a corporation), bankrupt,

Appellant,

vs.

CALIFORNIA AND HAWAIIAN SUGAR REFINING COMPANY (a corporation), THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA (a corporation), and CANTON BANK (a corporation),

Appellees.

BRIEF FOR APPELLANT.

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Statement of Facts.

This action was originally brought by the Continental Candy Co. (see 270 Fed. 302). Since that time, the plaintiff has been adjudged a bankrupt, a trustee appointed, and that trustee substituted as plaintiff. In May, 1920, the Candy Company entered into two contracts with the defendant, for the purchase of 1250 tons of "Java White" sugar, for shipment from Java in September and October.

Payment was provided for by the establishment of two irrevocable letters of credit, one on the defendant First National Bank for $300,000.00, and one on the Canton Bank for $255,800.00, both expiring December 31, 1920; both of the contracts contained the following provision:

> "Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same."

About the first of December, the sugar arrived in this port. The Candy Company thereupon filed its bill, alleging, among other things, that the clause quoted above was void as being in restraint of trade under the anti-trust laws, and praying that valuation under and collection of the letters of credit be enjoined. Upon filing of the bill, Judge Rudkin issued, after hearing, a preliminary injunction in accordance with the prayer. The defendant in its answer alleged that the prohibition against a resale of the sugar was inserted in the contracts at the request and by the direction of the Bureau of Investigation of the Department of Justice and the Fair Trade Commission. It also alleged that it was a licensee under the Act of August 10, 1917, entitled, "An Act to provide further for the National Security and Defense by encouraging the production, conserving and supply, and controlling the distribution of Food Products and Fuel." That Mr. Hoover was appointed Food Administrator under this Act, and that the defendant, as a condition to securing its license, was obliged to conform to the rules, of which Rule 6 reads as follows:

> "Resales Within Same Trade Prohibited, When.—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade, without unreasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice."

It is then alleged that the powers of Mr. Hoover were by proclamation of the President (dated November 21, 1919) transferred to the Attorney General.

Upon the trial, it appeared that the main business of the defendant is refining Hawaiian sugar. The sugar in question, however, was part of a purchase of 10,000 tons of Java sugar, imported by the defendant. The evidence shows that this sugar was imported for direct sale, and not for refining. (Transcript, page 159.) It was sold, however, only to manufacturers of candy, bakers, and canners, and not to grocers or others for household use. It appeared that to use up the shipment, some fifty contracts were made, and they all contained this clause prohibiting a resale. By far the larger part of defendant's business, however, was in selling its own refined sugar; and in contracts for its own product, no such prohibition was exacted.

It appeared that an investigator for the District Attorney, Mr. Montgomery, and the Chairman of the local Fair Trade Commission, Mr. Miller, were the persons who told defendant to put in the clause that it was not for resale. On this point, the

evidence of Mr. Brown, Sales Manager for defendant, was as follows:

> "Clause 6 was put into the contract on the verbal say-so of Mr. Montgomery, and also the Fair Trade Commission, who were working in conjunction with Mr. Montgomery's superior, Mrs. Annette Adams. The Fair Trade Commission was formed under the Department of Justice. H. Clay Miller was the chairman.
>
> "Q. Did he come down and tell you that in all the Java sugars you must put in the clause that it should not be resold under any circumstances?
>
> "A. He told me that they passed on the thing. Mr. Montgomery came to the office and told me distinctly that, as I remember; whether Mr. Miller told me over the phone or in person, I don't remember, but he did so tell me. Mr. Montgomery and Mr. Miller told me that I must put in a clause that it was not for resale. Mr. Montgomery told us that Mrs. Annette Adams wished us to sell this sugar to manufacturers only, and that they had to use it in their own manufacturing, and not to resell for profit; it could not be passed on; that we had to put that in our contract. Furthermore, in supplying them with this amount of sugar, they could not call on us for any further refined sugar." (Transcript, pages 168, 169.)

Mr. Montgomery testified that he received his instructions from Mrs. Adams, then District Attorney in San Francisco. These instructions were that this Java sugar could be sold only to manufacturers, and that it was not to be resold. (Transcript, page 253.)

As to this, the evidence of Mrs. Adams is as follows:

"We were endeavoring, as a part of our work in reducing the high cost of living and enforcing the Lever Act, to bring about the same equitable distribution of sugar that had been had under the Food Administration and the Sugar Equalization Board. There was no legal provision that the sugar should be so distributed, but the refiners agreed with us that they would, as far as possible, continue their allotment of sugar, giving their customers proportionate parts, that portion to depend upon the business which they had transacted with them theretofore. In other words, each wholesaler, when a particular lot of sugar was ready for distribution, was to have his proportionate share of that sugar. And we were endeavoring to prevent any wholesaler or any retailer or any manufacturer from hoarding sugar; that is, from obtaining a portion or contracting for a greater supply of sugar than he needed for his immediate needs, for his reasonable use, for a reasonable time, which is the language of the Act." (Transcript, page 257.)

The reasons are further made plain by Mr. Montgomery as follows:

"I did not tell the California & Hawaiian Sugar Refining Company to insert the provision against resale in any of their contracts for other sugars except this particular 10,000 tons. Mrs. Adams did not show any written order from the Attorney General's office in regard to this sugar. I received verbal notification from her.

"The COURT. Was there any reason in your own mind for differentiating between the contract to be followed in the sale of the refined sugar and the contract to be followed in the matter of Java sugar? Was there anything?

"A. No particular thing. The only difference is that with the domestic refined we were

aware at all times of their margins, it was being allocated, and, we were in direct contact with it, whereas with the Java we were not; it was going out of our territory, and we were afraid of resale. By going out of our territory I mean that it was going to Chicago." (Transcript, page 277.)

Mr. Weatherly, who was in charge of the Fair Price Commissions for the Department of Justice (under Mr. Figg, Special Assistant to the Attorney General), testified:

"Q. I call your attention to a clause in the contract dated May 18, 1920, between the California & Hawaiian Sugar Refining Company and the Continental Candy Company of Chicago, the clause dealing with it being as follows:

'Clause 6. Buyer agrees to use the sugar only for his own manufacturing needs, and under no circumstances to resell the same."

Did the Department of Justice at Washington, either through you or through anyone else connected with the Department of Justice, insist or even authorize, or insist upon or cause to be authorized or insisted upon, the issuance of such a clause in the contract for the sale of sugar in California? A. No.

Q. At any time? A. Never at any time.

Q. I am going to call your attention to this clause 7, of the sale contract:

'Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Company from delivery date of these Java Whites until the end of the year.'

Did the Department of Justice, on May 20, or on a subsequent date, did the Department of Justice authorize, insist upon, or purport to

authorize or insist upon the insertion in the contract for the sale of sugar in San Francisco? A. No.

Q. Or anywhere else?

A. No." (Transcript, pages 328, 329.)

And again:

"Assuming that the Fair Price Committee of San Francisco, California, in May, 1920, would have requested permission or authority from the Attorney General's office for the insertion of either of these clauses in the contract for the sale of sugar, our department would not have authorized the insertion of these clauses in any contract for the sale of sugar, the reason that so far as any control was exercised, it was exercised over the distribution of sugar. It is mostly in the licenses and regulations, and such a clause as that—I am referring to the first clause read, the first clause in the contract, 'Buyer agrees to use this sugar only for his needs and under no circumstances will he sell the same', I would refer to the committee that particular clause since it does not or is not used in connection with resales within the trade. It would directly conflict with the purpose of the Governmental control in that it would tend to interfere with the possible movement of the sugar to the consumer. In other words, should the purchaser under that contract, and referring to that specific clause cited, finding himself with more sugar than his manufacturing purposes required, and sought to dispose of it to the consumer, he would be, if that clause were in the contract, I think he would be prevented from doing that very thing he intended should be done, and such a clause would be very much out of the public interest." (Transcript, page 330.)

Upon this evidence the Court directed the entry of a decree for the defendant, upon the sole ground that, admitting the resale clause as within the prohibition of the Sherman Act, still it was, under the circumstances within the "rule of reason" as announced in the Standard Oil case.

I.

THE CLAUSE OF THE CONTRACTS PROHIBITING A RESALE IS VOID AS BEING IN RESTRAINT OF TRADE.

It may be worth while, at the outset, to quote the first section of the Sherman Act. It reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court. (26 Stat. 209.)"

The other provisions of the Sherman Act are familiar and manifest the intention of Congress to protect the public and all members thereof against such illegal contracts.

One of the important anti-trust laws of the United States originally appeared as Section 73 of the Wilson Tariff Act of 1894. It has since been

amended by Congress and is declared by the Clayton Act of 1914 to be, as amended, one of the anti-trust laws of the United States. Section 73 of the Act of 1894 as amended, expressly applied the rule of the first section of the Sherman Act to any contract between two or more persons or corporations either of whom as principal or agent is engaged in importing any article from any foreign country into the United States, when such contract is intended to operate in restraint of lawful trade or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article imported, or intended to be imported, into the United States, or of any manufacture into which such imported article enters, or is intended to enter. (U. S. Comp. Stat., Sec. 8831.)

And Section 16 of the Clayton Act of 1914 settles the dispute which theretofore existed in the Federal Courts as to the right of remedy by injunctive relief against threatened loss or damage by a violation of the anti-trust laws. Section 16 of the Clayton Act expressly declares that any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any Court of the United States having jurisdiction over the parties, against threatened loss or damage, by a violation of the anti-trust law, when and under the same conditions and principles as, injunctive relief as against threatened conduct that will cause loss or damage, is granted by Courts of Equity.

Each contract contains the following clauses:

> "6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same."
>
> "7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java White until the end of the year." (Transcript, page 23.)

One of the contracts, that of May 14, 1920, was for 750 tons, 250 tons to be shipped from Java in September, and 500 tons to be shipped from Java in October. The other contract, that of May 18, 1920, was for 500 tons to be shipped from Java during October. How each of two entirely separate contracts was to constitute the buyer's quota of precisely the same kind of sugar until the end of the calendar year, it is difficult to understand, but the quota paragraph is chiefly important as throwing a light on the attitude and economic conception of the seller when the resale paragraph is being considered. The language as to the allowance of a quota is the language of monopolistic control. The seventh clause was virtually a restriction upon the right of the buyer to purchase any more sugar from the seller during the remainder of the calendar year, and this was itself a restriction upon trade, though, of course, nothing like as drastic as the restriction embodied in the sixth clause of the contracts.

The principal question is whether the resale paragraph is illegal. The general principle, both at common law and under the Sherman Act, is that

contracts in unreasonable restraint of trade are illegal and invalid. (13 Corpus Juris, 467-489.) We recognize that a contract is not necessarily invalid because it may operate in some restraint of trade; if it is both reasonable as between the parties themselves and not at variance with the public interest, it may be recognized and enforced by the Courts. The recognition of the "reasonable" requirement, in construing the Sherman Act, was made familiar by the decision of *Standard Oil Co. et al. v. United States,* 221 U. S. 1.

We claim paragraph 6 of this contract is in unreasonable restraint of trade, and renders the whole contract void.

There is no doubt that this agreement not to resell is in restraint of trade. And the restraint is unreasonable and detrimental both as to the buyer and as to the public.

While the Continental Candy Corporation was itself a larger user of sugar, its factories, all or some of them, might be idle for long periods of time. And at particular times it might have large surplus stocks of manufactured candy greatly in excess of its ability to sell throughout periods of many months beyond a particular date. In the ordinary course of trade it does not follow that stocks of manufactured candy will necessarily conform in volume to abundance or to lack of sugar; this company, or all candy manufacturers, may have a great over-supply of manufactured candy at a period when there is temporarily an acute general

shortage of sugar; and one given manufacturing company may have vast candy stocks at a time when other manufacturers are in sharp need of sugar, or when there is a great general demand of the public for sugar. Furthermore, regardless of the candy market any single manufacturer may at given times be unable to carry on manufacturing operations and to use any or much sugar; such a manufacturer may have to close all or part of his factories on account of fire or other casualty, or on account of persistent strikes, or on account of financial reverses or losses; and it may be true that at such times the general public demand for sugar is extraordinarily pressing. If at any of the times suggested in the foregoing, manufacturers holding millions of pounds of surplus sugar can freely sell that commodity, the tendency is to reduce or keep down its price. Innumerable other instances and occasions why it may be desirable and in the public interest for manufacturers holding large stocks of sugar to be able to sell it, will suggest themselves to any one giving the subject consideration. Manifestly, such a prohibition against resale as is contained in the contracts in question restricts competition, and the general rule has always been that contracts are invalid when they tend to lessen competition. The general prevalent economic view in this country has been and is that restriction of competition tends to raise or keep up prices of commodities, and, of course, such a tendency is deemed detrimental to the public interest.

Most of the cases holding contracts to be in unreasonable restraint of trade are with reference to contracts only in partial or conditional restraint, such as that the commodity shall be resold only at a certain price. Clearly such a provision in a contract is far less restrictive than a provision that the commodity shall not be resold at all. The authorities, therefore, condemn unqualifiedly general restrictions against sale or alienation, except as to particular articles like works of art, heirlooms, or domestic pets, something to which sentiment or the like attaches, and which do not affect the general course of trade. Thus, in the *Dr. Miles Medical Co.* case, 220 U. S. 373, at page 404, the Court declared that a general restraint upon alienation is ordinarily invalid, and quoted with approval the well-known observations of Lord Coke thereon. And in *Straus v. Victor Talking Machine Co.,* 243 U. S. 490 at page 501, the Supreme Court said that to place restraints upon the further alienation of a commodity has been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest.

The leading price restriction cases, in which the Federal Courts have held invalid, indeed criminal, the making of interstate restrictions upon resale by limiting the price, even as to patented articles, are:

Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373;

Straus v. Victor Talking Machine Co., 243 U. S. 490;

Motion Picture Patents Co. v. Universal Film Mfg. Co. et al., 243 U. S. 502;
Boston Store v. Amer. Graphophone Co., 246 U. S. 8;
U. S. v. A. Schraeder's Son, Inc., 252 U. S. 85.

See also,

Park & Sons Co. v. Hartman, 153 Fed. 24;
B. V. D. Co. v. Isaac et al., 257 Fed. 709;
13 Corpus Juris, 483 and cases in notes.

An extensive annotation of cases on resale price control is contained in

7 *A. L. R.* 449.

Moreover, the clause seems to come directly within the language of the Wilson Act. Section 73 of that Act in part reads:

> "Every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which said imported article enters or is intended to enter. * * *" (United States Com-

piled Statutes, § 8831—Act Aug. 27, 1894, c. 349, § 73 as amended, Act Feb. 12, 1913, c. 40.)

In this case, it is clear that the sugar, by the very terms of the contracts, was imported from Java.

Again, the Lever Act itself provides (Section 4):

> "It is hereby made unlawful for any person wilfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or wilfully to permit preventable deterioration of any necessaries in or in connection with their production", etc.; "to hoard, as defined in Section Six of this Act, any necessaries; to monopolize, or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof, or (e) to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section." (Act August 10, 1917, c. 53, § 4.)

It would be hard to imagine any more effective restriction upon distribution than a covenant that goods were not to be sold at all.

II.

THE GENERAL RULE IS THAT A VIOLATION OF THE LAW IS NOT EXCUSED BECAUSE THE VIOLATOR HAS OFFICIAL SANCTION FOR HIS ACT.

In

Dodd v. State, 18 Ind. 56,

there was a suit on the official bond of Dodd, Auditor of State, on the ground that he had received certain fees, which he had failed to pay into the State Treasury. One of the matters set up in defense was that the Auditor, in receiving and retaining the fees, was acting under the written opinion of the Attorney General of the State. The Supreme Court held that the official opinion of the Attorney General of the State can constitute no legal justification of any officer, for any act done in pursuance of it, but such act must be tested by the law.

In

State v. Sparks, 27 Texas 627,

prisoners were wrested from the sheriff by the defendant Sparks, whose defense was that he was acting under the direction and authority of Major General Magruder. The Court said:

> "Nor can an illegal act be justified by an order from superior authority, no matter how high the source from which it emanates."

In

State v. Simmons, 143 N. C. 613; 66 S. E. 701,

it was held that the unlawful carrying of a concealed pistol by a game warden is not excused by

the fact that the warden, acting under the advice of the clerk of the Court that, being a constable, he had the right to carry the pistol, carried it under that belief.

In

State v. Foster, 22 R. I. 13; 46 A. 833,

it was held that where the statute makes it a misdemeanor for itinerant vendors to sell merchandise without first obtaining a state and local license, the fact that a merchant having a permanent place of business in a city of the state was advised by the state treasurer that it would not be necessary for him to procure a license to temporarily exhibit his goods for sale in another town of the state, and that the act did not apply to him, did not exempt such merchant from prosecution for a violation of the statute.

In

Head v. Porter, 48 Fed. 481,

it was held that an officer of the United States, in charge of a government armory, may be sued in the Circuit Court for infringement of a patent, notwithstanding that all his acts in relation thereto have been performed under the orders of the government.

It has often been held that a military officer cannot justify his trespass in taking private property by producing the order of his superior.

Mitchell v. Harmony, 54 U. S. 115;

Jones v. Commonwealth, 1 Bush 40; 89 Am. Dec. 609;

Mostyn v. Fabrigas, 1 Cowp. 180;
Hogue v. Penn., 3 Bush 666; 96 Am. Dec. 276;
Ferguson v. Loar, 5 Bush 694;
Yost v. Stout, 4 Cold. 212; 84 Am. Dec. 198;
Clark v. Mitchell, 64 Mo. 567;
Stanley v. Schwalby, 85 Tex. 355; 19 S. W. 267;
Hedges v. Price, 2 W. Va. 225; 94 Am. Dec. 511;
Skeen v. Monkeimer, 21 Ind. 4.

The advice of counsel furnishes no excuse to a client for violating the law, and cannot be relied upon as a defense either in a civil action or in a criminal prosecution.

U. S. v. Anthony, 24 Fed. Case. No. 14,459;
Dodd v. State, 18 Ind. 56;
State v. Goodenow, 65 Me. 30;
Smith v. State, 46 Tex. Crim. Rep. 267; 81 S. W. 712;
Jasper v. Purnell, 67 Ill. 361;
Commonwealth v. Middelby, 187 Mass. 342; 73 N. E. 208;
Weston v. Commonwealth, 111 Pa. 251; 2 A 1919;
State v. Hunt, 25 R. I. 69; 54 A 937;
People v. Weed, 29 Hun. 628; 96 N. Y. 625;
Medrano v. State, 32 Tex. Cr. 214; 22 S. W. 684.

In

1 *Wharton Criminal Law,* page 484,

the rule is thus laid down:

> "The fact that an act is done by an officer of the government, or an agent or representative of the government acting under the direction of a superior officer of the government, will not constitute a ground of defense, and exempt the person so acting from personal liability for the wrongful act."

In

People v. McLeod, 1 Hill 377; 25 Wend. 483,

it was held that the fact that a crime was committed in time of peace under the direction of the local authorities of a foreign government, is no defense.

III.

IT IS CLEAR, IN ANY EVENT, THAT THE DISTRICT ATTORNEY IN SAN FRANCISCO, HAD NO POWER OR AUTHORITY TO DIRECT MR. MONTGOMERY TO ASK FOR ANY SUCH RESTRICTION.

It seems, from the testimony of Mrs. Adams, that what she was endeavoring to accomplish was to prevent the Middle West from securing sugar to the detriment of the Pacific Coast. Her argument seems to be, that a buyer of this sugar might obtain more than his needs and pass it on to others. How this can be reconciled with the fact that the defendant's own product was permitted free sale, and this restriction confined only to this Java sugar, it is difficult to see. Moreover, it is perfectly clear that Mrs. Adams had no authority whatever from her

superior, the Attorney General,—in whom, if in anyone, was vested this control—to exact any such condition. Moreover, the zoning system had been abolished, by express provision of Act of Congress, before these contracts were made. On the 31st of December, 1919, the Lever Act was amended, and this language added:

> "Provided that the provisions of this Act shall expire as to the domestic product June 30, 1920; and provided, further, that the zone system of sale and distribution of sugars heretofore established by the said United States Sugar Equalization Board shall be abolished, and shall not be re-established or maintained, and that sugars shall be permitted to be sold and to circulate freely in every portion of the United States."

So that, the act of the District Attorney in demanding and the act of the defendant in inserting this clause, if it was for the purpose of protecting the Pacific Coast, was in violation of the statute abolishing the zone system. But the amendment goes much further than that; it provides that sugars shall be permitted to be sold and to circulate freely *in every portion of the United States.*

Furthermore, the direction of Mrs. Adams and Mr. Montgomery were in direct violation of the rule put out by the Food Administration. That section, known as Section 6, prohibits resales "within the same trade". But this was not a restriction within the same trade. Its terms are absolutely general—it prohibits the Candy Company from selling the sugar anywhere, to anybody, at any time. And this

is likewise in violation of the other language of this section of the regulations, which reads:

> "The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as possible, and without unreasonable delay."

The Court below decided the case really upon the ground that the country was, nominally at least, still in a state of war (although hostilities had been at an end for more than a year and a half) and that therefore, the restriction must be considered as a reasonable one. The language is as follows:

> "If this contract had been entered into in normal times, and if the defendant Sugar Company had inserted this clause in the contract with the intention on its part to prevent a subsequent sale of this sugar in order that it itself thereafter might sell more of its own sugar, and in that wise create some sort of a monopoly, or in that wise consummate some sort of a restraint upon the trade in sugar, I would be disposed to give very careful consideration to the argument advanced to the effect that that is the sort of a contract that public policy requires should be declared and held to be invalid. But that is not the situation at all. It is not a time of peace; it is not a time for the normal operation of usual economic laws; it is a time of war, a time of attempted readjustment and recovery from participation in the greatest war that civilization probably has known." (Transcript, page 100.)

But the Supreme Court has held time and again that the existence of a state of war does not author-

ize even Congress to enact an unconstitutional law. The latest expression on this subject is the case in which the Supreme Court declared void Section 4 of the Lever Act. The language is as follows:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the 5th and 6th Amendments as to questions such as we are here passing upon. Ex parte Milligan, 4 Wall. 2, 121-127; 18 L. ed. 281, 295-297; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336; 37 L. ed. 463, 471; 13 Sup. Ct. Rep. 622; United States v. Joint Traffic Asso., 171 U. S. 505, 571; 43 L. ed. 259, 288; 19 Sup. Ct. Rep. 25; McCray v. United States, 195 U. S. 27, 61; 49 L. ed. 78, 97; 24 Sup. Ct. Rep. 769; 1 Ann. Cas. 561; United States v. Cress, 243 U. S. 316, 326; 61 L. ed. 746, 752; 37 Sup. Ct. Rep. 380; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 156; 64 L. ed. 194, 199; 40 Sup. Ct. Rep. 196. It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or nonexistence of a state of war becomes negligible, and we put it out of view."
>
> *United States v. Cohen Grocery Co.,* 65 L. Ed. 520, 521.

To uphold the decision of the lower Court, therefore, is to grant to a District Attorney a power beyond that which could be exercised by Congress itself.

IV.

THE ILLEGAL CLAUSE DESTROYS THE WHOLE CONTRACT.

It is apparent from the answer, and the evidence shows without contradiction, that the Sugar Company would not have entered into the contract without this provision. The agreement was prepared in San Francisco, and sent to the Candy Company in Chicago, and the latter was told that the contract must go as written or not at all. The rules are laid down in

Hastings v. Shackles, 202 U. S. 71,

as follows:

> "The test is, would the contract have been entered into by either of the parties if it were not for the illegal consideration."

And again:

> "Every part of the consideration goes equally to the whole promise, and, therefore, if any part of it is contrary to public policy the whole promise fails."

The evidence shows that at the time the contracts were made, sugar was very high. The principal business of defendant was refining and selling Hawaiian sugar. It was, of course, to its interest that this high price should continue. It was, therefore, equally to its interest that this 1250 tons should be used in the Candy Company's business, and not thrown into the market to compete with their own product. It was, therefore, of advantage to them,

and a great detriment to us. In either event, it was clearly a part of the consideration.

By means of this device which the defendant adopted in this case, they sold this 10,000 tons of Java whites to various canners, manufacturers of syrups, manufacturers of confectionery, wholesale bakeries and the like, gave them the amount, and compelled them, by this clause, to hold it and to hoard it, if need be, and thereby take away that amount of competition from the sale of their own refined product to the householder, the hotel man, the restaurant man, or what-not; and it is a significant fact that while they enforced that clause against resale in every single contract that they made for these Java sugars, there was not a word said in any of the multifarious contracts running to 400,000 tons which they made for the sale of their own sugar.

V.

THE JURISDICTION OF EQUITY TO ENJOIN THE COLLECTION OF PAPER GIVEN TO SECURE AN ILLEGAL CONTRACT IS CLEAR.

We think on this subject, we need do no more than cite the text writers:

Bispham says:

> "In every case where rules of public policy are violated, and where relief could be afforded by the machinery of a court of chancery, and where a full, adequate, and complete remedy could not be had at common-law, equity will

interpose for the purpose of restraining an action brought to enforce such a contract, or to compel the surrender of the instrument by which it has been secured." (Bispham's Equity, Sec. 229.)

And Pomeroy says:

"Where the agreement is thus void, a court of equity may always exercise its jurisdiction defensively, by defeating a suit brought for the enforcement of the contract; or affirmatively, by granting the remedy of cancellation or of injunction when the defensive remedy at law would not be certain, complete, and adequate." (2 Pomeroy's Equity, Sec. 934.)

VI.

THE COURT BELOW SHOULD BE DIRECTED TO ENTER JUDGMENT AGAINST THE DEFENDANT FOR THE AMOUNT COLLECTED ON THE LETTERS OF CREDIT, WITH INTEREST.

While there is a general rule that if, pending appeal, events happen which render it impossible, without the fault of the defendant, to give the plaintiff the relief he sought by his suit, the appeal will be dismissed, still it is recognized that where, after the filing of the bill for an injunction without plaintiff obtaining the injunction, the defendant proceeds to do that which is sought to be enjoined, and it is afterwards held on appeal that the plaintiff was entitled to the injunction, the plaintiff will be given as adequate relief as it is possible for the court to give.

The general principle is stated and authorities cited in

Mills v. Green, 159 U. S. 651, 654;
Platteville v. Galena & Southern Wisconsin Ry., 43 Wis. 493,

is a good illustration. In that case a municipality obtained a temporary injunction against the location of a railway in violation of a contract with the municipality. On further hearing the injunction was dissolved by the trial Court. The railway was then built in the location which the plaintiff complained of. The dissolution of the injunction was reversed by the Supreme Court of Wisconsin. The Supreme Court, speaking by the distinguished Chief Justice Ryan, at pages 506-7 said:

> "The course of the respondent was willful, wrong and gross fraud towards the appellant, and the injunction restraining it should have been continued. But it is said, and indeed conceded, that the road enjoined has been actually built since the dissolution of the injunction. It is therefore urged that the injunction will be ineffectual. It is none the less the duty of this court to reverse the order dissolving it. And it will be thereupon the duty of the court below to exercise its authority, as far as it can, towards repairing the wrong which its error has permitted. 'The consequence may possibly be to stop the railway. I answer that it ought to be stopped, for it passes where it does by wrong.' *Shadwell, V. C. in Att'y Gen'l v. G. N. Railway Co.,* 4 De Gex & Sma. 75. The construction of the road pending the appeal was a bold and dangerous risk in disregard of judicial authority. The railroad company is the creature of the law, and must be taught, if need be, that the law is stronger than its

creature; and that the construction of a road in violation of the law and its duty does not place it beyond the power of the courts to enforce its good faith and obedience to the law in the performance of its contracts.

By the Court:—The order dissolving the injunction is reversed, and the cause remanded to the court below for further proceedings according to law."

In

Terhune v. Midland Railroad, 36 N. J. Eq. 318,

the Court held that the fact that the act sought to be enjoined may have been accomplished pending appeal, does not take away the right of appeal because the Court may, on such an appeal, hear and adjudge the right upon which a preliminary injunction should have been granted.

In

Tucker v. Howard, 128 Mass. 361,

plaintiff filed a bill for an injunction, but no temporary injunction was granted. After the commencement of the suit the Supreme Court held that the building sought to be enjoined would be in violation of plaintiff's right. But in the meantime defendant had built the wall. The Supreme Court held the plaintiff was entitled to have the wall removed and to a decree for a mandatory injunction and for payment of damages suffered pending the suit.

The general rule also is that on reversal of a judgment or a decree, the law raises an obligation

on the part of the party who received benefits from its enforcement to restore those benefits to the adverse party. (4 Corpus Juris 1235-1239, 1203.)

It is proper for a reviewing Court in an equity cause to direct the rendition of a final judgment by the lower Court. (4 Corpus Juris 1192.) And when the reviewing Court is ordering the entering of judgment it may bear in mind that a Court of equity grants relief according to the status of the parties at the time of the decree. (*Randel v. Brown,* 2 How. 406.) A reviewing Court may proceed to correct the fundamental error and finally dispose of the case in that manner in which it should have been disposed of in the Court below. (2 R. C. L. 284, Sec. 238 of article ..... on Appeal and Error, and cases cited in Note 18.)

It is the duty of the Court to enter a decree operating upon the parties and subject matter as they stood at the commencement of the suit. (21 Corpus Juris 663.) But the Court will grant relief in the light of the situation existing at the time of the entry of the decree. See, *Denver v. Mercantile Trust Co.,* 201 Fed. 790, 810; and especially *McCormick v. Oklahoma City,* 203 Fed. 921, and authorities cited on page 925; and *Southern Pacific R. R. Co. v. Allen,* 5 Cal. Unreported Cases 51; 40 Pac. 752, 754.

Under the prayer for general relief recovery of money judgment may be allowed. A prayer for general relief is as broad as the equitable powers of the Court. (21 Corpus Juris 679.) Such a gen-

eral prayer may serve as a substitute for the prayer for special relief and authorize relief of a different nature when that specially prayed is denied, even to the extent of substituting a money decree in lieu of relief specifically prayed. (21 Corpus Juris 681-2.) Matters accruing pending suit may be adjudicated and disposed of under a general prayer. (*Burleigh v. White,* 70 Me. 130.)

A direct attack upon a bill by appeal certainly should yield as much relief as proceedings by extraordinary remedies like supplemental proceedings or a bill of review. It has been held that when it is sought to open a decree by a motion or petition, and when the motion or petition is allowed, it is the duty of the Court to render a final decree such as should have been rendered in the first instance. (21 Corpus Juris 720.) And when a bill of review is sustained the Court may proceed to render such decree as should have been rendered in the first instance. (21 Corpus Juris 766.)

We, therefore, respectfully submit that the judgment should be reversed, and the Court below directed to render judgment for $555,800.00, with interest.

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